IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 223 OF 1996

1. Prakash Maruti Mokal
   Age - about 28 years,

2. Pralhad Sakharam Patil,
   Age about 30 years,
Both resident of the Village
Sai, Taluka Panvel, Dist.Raigad,
[At present in Yerwada
Central Prison] .. Appellants / Original Accused Nos. 1 and 2.

Versus

The State of Maharashtra,
[At the instance of the Inspector
of Police, Panvel Taluka Police
Station, Panvel, Dist. Raigad] .. Respondents [Complainants]

Mrs. Manisha Patil for the Accused / Appellants Nos. 1 and 2.
Mr. B.H. Mehta, Addl. Public Prosecutor for the State.

CORAM : S.K. SHAH, J.

DATED : 7.12.2004.

ORAL JUDGMENT :

1. The appellants, who are the original accused No. 1 and accused No.2, challenge the order of conviction and sentence passed by the learned Additional Sessions Judge, Raigad, in Sessions Case No.156 of 1992 convicting both of them of the offences punishable under section 307 r/w section 34 of the Indian Penal Code and under section 394 r/w section 34 of the Indian Penal Code and sentencing them to suffer R.I. for five years and to pay fine of Rs.500/- in default to suffer R.I for three months on each of the two counts.

2. Briefly stated the story of the prosecution is as under :-

. The complainant - injured Yashvant Mangalya Mokal [PW1] and both the appellants are resident of village Sai, Taluka Panvel, Dist. Raigad. It is the common ground that the complainant Yashvant Mangalya Mokal [PW1] and the two appellants have political rivalry. About two years prior to the incident, which took place

on 8.9.1991, there was some incident of assault by Anna Yashvant Patil and Gajanan Gavand on the complainant Yashvant [PW1] and the criminal case in respect thereof was pending in the Court. It is alleged by the prosecution that both the appellants were asking the complainant- Yashvant Mangalya Mokal [PW1] to withdraw the said case. However, the complainant Yashvant [Pw1] was not ready to do so.

3. On the day of incident on 8.9.1991 at about 10.15a.m., the complainant - Yashvant [PW1] was proceeding towards village Sai from Kharpada on foot. On the way, he reached near Bhom Nagar S.T. bus stop. At that time, both the appellants went to the complainant - Yashvant [PW1] and assaulted him with swords on his head and on legs. The complainant then fell down on the ground. He raised shouts. Having heard the shouts, Narayan[PW2]- brother of the Complainant -Yashvant [PW1], arrived there. By that time, the police also arrived there with van. Having seen them, both the assailants ran away. In the mean time, it is alleged that, the appellant No.1 held the complainant - Yashvant [PW1] and the appellant No.2 removed Rs.955/- and railway pass from the pocket of the complainant - Yashvant [PW1]. They ran away after having seen the arrival of the police.

4. Police Sub-Inspector Patel [PW7], at the very time, was on duty at Kharpada bridge, as some Minister was to pass by the road. He having seen that two persons assaulting one person near the bus stop of Bhom Nagar, he rushed there. The injured - complainant - Yashvant [PW1] was moved by the Jeep to Panvel Hospital. Police Sub-Inspector Patel [PW7] tried to chess the two assailants but he could not arrest them.

5. Head Constable Parab [PW6] was attached as P.S.O. to the Panvel Taluka Police Station. At about 11.00 a.m. he received phone call from the Government Hospital informing him that there was an incident of assault and the injured was admitted in the Hospital. He immediately made entry in the station diary [Exhibit - 31] and rushed to the hospital. When he reached to the hospital, he found injured complainant - Yashvant [PW1] was being treated by Dr. Kendre. He then recorded his statement, which was recorded as Dying Declaration but was taken as First Information Report [Exhibit -20]. He obtained thumb impression as well as the signature of the complainant - Yashvant [PW1] on it. On the basis of the said First Information Report, he registered the offence at C.R. No. 63 of 1991 and handed over it to Police Sub-Inspector Patel [PW7] for

investigation.

6. Police Sub-Inspector Patel [PW7] having taken over the investigation, he drew the panchnama of the scene of the offence [Exhibit - 25]. He then recorded the statements of Narayan [PW2] - brother of the complainant - Yashvant [PW1] and ten other witnesses. He arrested the appellants on 24.9.1991 and also two other accused persons, who were acquitted by the Trial Court.

7. It is alleged by the prosecution that on 24.9.1991, the appellant No.1 led to the discovery of sword, which was seized under the panchnama [at Exhibit - 23]. It is further alleged by the prosecution that the accused No.2 also led to the discovery of the sword which was seized under the same panchnama. During the course of investigation Police Sub-Inspector Patel [PW7] forwarded the clothes of the injured- complainant - Yashvant [PW1] as well as two swords to the Chemical Analyser, Mumbai under forwarding letter [Exhibit - 33]. The Chemical Analyser’s Report was received which is produced at Exhibit - 34, which shows that one of the swords was having stains of the human blood, whereas the another sword though was having blood stains, the blood was disintegrated, therefore, could

not be examined. Thus, after having completed the investigation, Police Sub - Inspector Patel [PW7] forwarded the charge-sheet against the appellants and two other accused persons to the Court of Judicial Magistrate, First Class, Panvel, who in turn, committed the case to the Court of Sessions as the offence was exclusively triable by the Court of Sessions.

8. All the four accused including the two appellants pleaded not guilty to the charge framed against them. There defence was of total denial and false implication due to enmity.

9. The evidence that was led before the learned Trial Judge was of complainant - Yashvant [PW1] himself; Narayan Mangalya Mokal [PW2]- the eye witness and the brother of complainant - Yashvant [PW1]; Anant Vithu Shelke [PW3]- the panch to the memorandum panchnama; Keshar Ganpat Patil [PW4]- the panch to the spot panchnama; Dr. Kendre [PW5] - who examined the injured - complainant - Yashvant [PW1]; Head Constable [PW6] who recorded the First Information Report and Police Sub-Inspector Patel [PW7]- the Investigating Officer.

10. Learned Additional Sessions Judge considered the

evidence and come to the conclusion that the offence on both the counts under section 307 r/w section 34 of Indian Penal Code and under section 394 r/w section 34 of the Indian Penal Code was established against the two appellants and therefore passed the order of conviction and sentence as aforesaid. He, however, acquitted the original accused Nos. 3 and 4 as there was no satisfactory evidence against them. It is this order of conviction and sentence, which is being assailed in this appeal.

11. I have heard the learned Counsels on both the sides and I am taken through the entire oral as well as the documentary evidence.

12. The learned Counsel representing the Appellants submitted that there are material omissions in the evidence of complainant - Yashvant [PW1] and the witness Narayan [PW2]. She further submits that as a result of previous enmity, the evidence of complainant and his brother Narayan [PW2] can not be relied upon. She further submits that the arrival of Narayan [PW2] at the spot and Narayan [PW2] having seen the actual assault does not appear to be believable, as, in her submission, Narayan [PW2], arrived at the spot only after the complainant raised shouts and the complainant

- Yashvant [PW1] raised shouts only after the assault was completed and he had fallen down on the ground. She submits that there were other independent witnesses available, but the prosecution had not examined them. In her submission, the solitary evidence of complainant Yashvant [PW1] can not be relied upon.

13. As against this, the learned Additional Public Prosecutor supported the judgment of the Trial Court.

14. It is undisputed that the injured - complainant - Yashvant [PW1] had sustained injuries at the relevant time. He states that on 8.9.1991 while he was standing at Kharpada - Bhom Nagar S.T. Bus Stop, at about 1.15 a.m., both the appellants came there holding sword in their hands and both of them assaulted him with swords. He states that appellant No.1 assaulted him on his head and appellant No.2 assaulted him on his hand by means of sword. He was given five blows on head, on hands and also on the left leg with sword. His First Information Report was recorded by about 11.30 a.m. by Head Constable Parab [PW6]. That First Information Report is produced at Exhibit - 20. The First Information Report discloses the assault made on him with sword. As the evidence of Police Sub - Inspector Patel [PW7] discloses that injured - complainant -

Yashvant [PW1] was immediately removed to the Government Hospital, Panvel. In support of the evidence of complainant - Yashvant [PW1] with regard to the injuries sustained by him, there is evidence of Dr. Kendre [PW5], who states that at about 11.30 a.m. he examined complainant - Yashvant [PW1] and he himself informed the police for recording his statement. On examination of complainant - Yashvant [PW1], he found following injuries :-

> *"[1] Incised wound just right to central frontal line vertical with sharp margin measuring - 3" X 1/4 cm X bone deep;*
>
> *[2] Incised wound over occipital area transverse with fracture occipital bone, measuring 1-1/2" X 1/4" X bone deep;*
>
> *[3] Incised wound over left posterior to ear with plap with suspected fracture measuring - 1/2" X 1/4" X bone deep;*
>
> *[4] Compound fracture to left humorous - upper 3rd area;*
>
> *[5] Punctured sharp injury, one below another measuring - 1/4 X 1/4 X 1/2 cm;*
>
> *[6] Abrasion left knee measuring -1" X 1/2"."*

He further states that all these injuries were caused within four hours. The injury Nos.1, 2 and 3 were on the vital parts of the body. The injury Nos. 2 and 3 were grievous in nature and were sufficient to cause

death. The injury Nos. 1, 2, 3 and 4 were possible by sharp edged weapon like sword and injury Nos. 5 and 6 were possible by hard and blunt object.

15. There is nothing material brought in the cross examination of complainant - Yashvant [PW1] as well as Dr. Kendre [PW5] with regard to the aspect of complainant - Yashvant [PW1] having sustained these injuries at the relevant time. Therefore, it was established by the prosecution that complainant - Yashvant [PW1] did sustain aforesaid injuries at the relevant time.

16. The next question which needs to be considered is whether the appellants had caused these injuries. In this regard, as stated above, complainant - Yashvant [PW1] has stated that these two appellants had assaulted him with the sword and caused the aforesaid injuries. His evidence is not only corroborated by the medical evidence i.e. of Dr. Kendre [PW5] and a medical certificate produced at Exhibit - 29 but also by the First Information Report [at Exhibit -20], which was lodged without any loss of time. The incident occurred at about 10.15 a.m. and the First Information Report [Exhibit -20] was recorded by about 11.00 a.m. to 11.30 a.m. although the offence came to be

registered at 1.30 p.m. at the police station. Therefore, the First Information Report has corroborative value and it does corroborate the evidence of complainant - Yashvant [PW1] when he states that the two appellants had caused the aforesaid injuries by assaulting him with swords.

17. In addition to this, the prosecution led the evidence of Anant Shelke [PW3], who was the witness to the discovery of sword at the instance of both the appellants. However, he turned hostile to the prosecution. Therefore, his evidence is of no value to the prosecution. In this regard, there is evidence of prosecution witness Mr. Patel - Police Sub Inspector [PW5], who states that on 24.9.1991, these two appellants led to the discovery of two swords [Article No. 8 and Article No.9]. According to him, both these swords were sent to the Chemical Analyser under forwarding letter [Exhibit - 32] and the report of Chemical Analyser is produced at Exhibit - 34, which shows that both these swords were found to be stained with blood. However, the results of the analysis were inconclusive. One of the swords was having stains of the human blood, whereas the another sword though was having blood stains, the blood was disintegrated and, therefore, no conclusion could be made. The seizure

panchnama does indicate that there were blood stains on both these swords. This evidence, therefore, did support to the evidence of complainant - Yashvant [PW1]. The evidence of Yashvant [PW1] has not been shaken at all though a searching cross examination was made on behalf of the appellants. The only submission that was made on behalf of the appellants is that this sole testimony can not be relied upon because of admitted previous enmity. However, enmity is always a double edged weapon. On one side that may give rise to cause for false implication to the complainant, but on the other hand the previous enmity is the strong reason for the accused to assault the complainant. The inference of false implication is not all possible in this case as for involving the accused in the case falsely, the complainant is not expected to get himself injured so seriously as would have led to his death.

18. There is evidence of Narayan [PW2]. His evidence has been relied upon by the Trial Court. The evidence of Narayan [PW2] shows that on 8.9.1991 at about 9.30 a.m. he went to Bhom Nagar S.T. Bus Stop. At about 10.00 a.m. he found his brother standing at the bus stand. He made enquiry with him as to how he came there and when Yashvant [PW1] told him that he came there on foot, he asked him whey he did not come by

rickshaw. After having this talk with Yashvant [PW1], he proceeded towards Kasar Bhat while Yashvant started proceeding towards the village side. Few seconds thereafter he heard shouts of Yashvant [PW1] to the effect that *"Dada, Dada Dhav, Mala Marle.*" He, therefore, turned back and saw the two appellants assaulting Yashvant[PW1] by means of swords. He also gives the details by stating that appellant No.1 assaulted with sword on Yashvant's head and second blow was given by appellant No.2 on the right hand by means of sword. He further states that appellant No.1 inflicted one blow of sword on the left hand of Yashvant [PW1], as a result Yashvant [PW1] fell down on the ground. Narayan [PW2], therefore, rushed there. By that time police van also came there. Thereafter the appellants ran away. He further states that injured Yashvant [PW1] was moved by the police jeep to the hospital. His evidence, however, does not inspire confidence when he states that he had witnessed the assault made by the appellants. This is so because Yashvant [PW1] does not state about he having met Narayan [PW2] just before the incident. Secondly, as per the evidence of Narayan[PW2], his attention was drawn to Yashvant [PW1] only after he heard shouts of Yashvant. The evidence of Yashvant [PW1] shows that he raised shouts only after he fell down which he did only

after all the blows were given by the appellants. Therefore, it is difficult to believe the presence of Narayan [PW2] at the spot as also the Narayan [PW2] having seen the actual assault. It is further material to note that Police Sub- Inspector Patel [PW7] also does not state about Narayan [PW2] having been present when he saw two persons assaulting one person and secondly, two persons having run away from the spot and then the injured was removed to the hospital. Under these circumstances, it is difficult to belive that Narayan [PW2] was present and had witnessed the incident. His evidence, therefore, can not be believed when he claims to be the eye witness to the assault.

19. Even so, as stated above, the evidence of complainant Yashvant [PW1] has been fully corroborated by the medical evidence as also his own First Information Report [Exhibit -20], which was lodged without any loss of time. His evidence has not been shattered at all. There is nothing to disbelieve his evidence. From the evidence of complainant Yashvant [PW1], therefore, it is clear that the appellants had assaulted him with swords causing aforesaid injuries. In the opinion of Dr. Kendre [PW5], the injury Nos.1, 2 and 3 were on the vital parts of the body and injury Nos. 2 and 3 i.e. the fracture of occipital bone and

fracture of skull were sufficient to cause death in the ordinary cause of nature. Therefore, from the evidence of complainant - Yashvant [PW1], it is established that the appellant / original accused Nos. 1 and 2 had caused the aforesaid injuries and had attempted to cause murder of Yashvant [PW1] by means of swords because of previous enmity and because Yashvant [PW1] refused to withdraw the case lodged against other two persons namely Anna Yashvant Patil and Gajanan Gavand, which was pending in the Court.

20. As to the charge framed under section 394 r/w section 34 of the Indian Penal Code, the complainant Yashvant [PW1] states that after he fell down, the appellant No.1 caught hold of him and the appellant No.2 removed cash of Rs. 955/- from his pocket. The same thing has been mentioned by him in the First Information Report [Exhibit - 20] and there is nothing to disbelieve the version of Yashvant [PW1] in that regard. The appellants are, however, convicted of the offences punishable under Section 394 r/w section 34 of the Indian Penal Code. However, the evidence disclosed does not indicate that hurt was caused while committing robbery of Rs.955/- but, in fact, the main intention of the accused was to cause hurt and in the process, the robbery was committed. Therefore, the learned Trial

Judge has committed an error in convicting the appellants of the offences punishable under section 394 r/w section 34 of the Indian Penal Code. However, the conviction should be under section 392 r/w section 34 of the Indian Penal Code.

21. Therefore, the order of conviction passed against the appellants for the offence punishable under section 307 r/w section 34 of the Indian Penal Code was proper. Although the conclusion and the evidence that Yashvant [PW1] having been robbed of cash of Rs. 955/- and other articles was proper, it was not proper to convict the appellants under section 394 r/w section 34 of the Indian Penal Code but the conviction should have been under section 392 r/w section 34 of the Indian Penal Code.

22. Under these circumstances, I do not find any merit in the appeal except the modification of the provisions of the offence punishable under section 394 r/w section 34 of the Indian Penal Code to section 392 r/w section 34 of the Indian Penal Code and consequently the sentence. The learned Counsel for the appellants, therefore, submitted that leniency should be shown to the appellants considering their young age i.e. of 25 and 27 years respectively at the time of commission of

offence. Learned Additional Public Prosecutor objects to the same saying that grievous hurt was caused by means of weapons like sword and, therefore, no leniency should be shown. I do not find that the appellants though were young at the time of occurrence should be shown leniency as their attempt was to commit murder of Yashvant [PW1] by assaulting him by means of swords. Hence I pass the following order :-

ORDER

1. The order of conviction and sentence passed by the Learned Trial Judge against both Appellant No.1 - Prakash Maruti Mokal and Appellant No.2 - Pralhad Sakharam Patil for the offences punishable under section 307 r/w section 34 of the Indian Penal Code is hereby maintained.

2. The conviction of both the Appellants for offences punishable under section 394 r/w section 34 of the Indian Penal Code is, however, modified to the one for offences punishable under section 392 r/w section 34 of the Indian Penal Code.

3. The sentence passed by the Trial Court for offences punishable under section 394 r/w section 34 of the

Indian Penal Code is hereby modified to the one being R.I. for three months and to pay fine of Rs. 500/- [Rupees five hundred only] in default to suffer sentence for seven days against each of the appellants.

4. The rest of the order stands.

5. The appeal stands disposed of accordingly.

[S.K. SHAH, J.]